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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

OTIS R. BOWEN, M.D., et al.,

Appellants,

v.

JUDY LESKO, et al.,

Appellees.

ON APPEAL FROM UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN UNDER 28 U.S.C. §§ 1252, 2101

JURISDICTIONAL STATEMENT

BRONSON C. LA FOLLETTE
Attorney General of Wisconsin
Counsel for Appellants

DONALD P. JOHNS
Assistant Attorney General
Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707
(608) 266-3406
Counsel of Record

September, 1986

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OTIS R. BOWEN, M.D., et al.,

Appellants,

v.

JUDY LESKO, et al.,

Appellees.

JURISDICTIONAL STATEMENT

QUESTION PRESENTED

Under 42 U.S.C. § 602(a)(38) as amended by the 1984 Deficit Reduction Act, whether the requirement that a family applying for AFDC benefits either include in the family unit all siblings and half-siblings living in the same house or include in the family resources money available to all siblings and half-

siblings under Title II or child support payments violates the children's fifth and fourteenth amendment rights to due process, just compensation and equal protection.

PARTIES

The appellants, defendants in the federal district court, are Otis R. Bowen, M.D., Secretary of the United States Department of Health and Human Services and Linda Reivitz, Secretary of the Wisconsin Department of Health and Social Services, both of whom are sued individually and in their official capacities with their agents, employes, successors in office, assistants and all others acting in concert or cooperation with them or at their direction or under their control.

The appellees, plaintiffs in the federal district court, are mothers suing on behalf of themselves and their minor children, and other persons similarly situated. There are two classes of children. First, there are children who seek to have their AFDC payments restored ("AFDC children"). Second, there are children who have money of their own and who are receiving payments from their fathers either through child support or social security survivor payments and who live with the AFDC children ("other children").

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OPINIONS BELOW

The decision on appeal, set forth at App. 101-141, is unreported.

JURISDICTION

The decision and order on appeal were issued on July 16, 1986, by the federal district court. This is a class action challenging recent statutory changes in the AFDC program under the Deficit Reduction Act of 1984 (DEFRA), Public Law 98-369. These new provisions provide that in order for a family to be eligible for AFDC benefits the application for benefits on behalf of the dependent child must include all siblings, including adoptive, full and half brothers and sisters, living in the same household, and the income of all siblings must be counted as available to the entire family. If a needy child who

is applying for or receiving AFDC benefits refuses to include a sibling living in the same home in his or her application for benefits, AFDC benefits are denied or terminated.

The case arises under the laws of the United States. Jurisdiction below was conferred by 28 U.S.C. § 1331.

In its Findings of Fact, Conclusions of Law, and Order of July 16, 1986, the district court certified this action as a class action under Federal Rules of Civil Procedure 23 on behalf of the following class:

> (a) All needy dependent children who live with half-siblings receiving Title II or child support payments who have been denied AFDC or whose AFDC benefits have been, are being or will be reduced or terminated because their half-siblings are included in the family's AFDC grant and the Title II or child support payments are considered

income available to the entire family;

(b) All children who receive Title II or child support payments who do not need AFDC benefits but live with half-siblings who are needy dependent persons eligible for AFDC; and

(c) All parents or other caretakers of needy dependent children who have within their families children who receive Title II or child support payments and who are being required to apply for AFDC for all children in the household.

The court also enjoined appellants from denying, reducing or terminating AFDC benefits on the basis of any rule or policy promulgated under section 2640(a) of DEFRA, which amended 42 U.S.C. § 602(a)(38). The court's order also enjoins appellants from (1) requiring that anyone applying for or receiving AFDC benefits must, as a condition of application for and continued receipt of

benefits, include minor children residing in the home who receive Title II or child support payments or have other income, (2) assuming that Title II or child support payments of a child who resides with half-siblings who receive AFDC benefits are available to meet the needs of such AFDC children, and (3) requiring that the child support payments of a child be assigned to the state as reimbursement for AFDC paid to AFDC children. By order of August 14, 1986, the district court stayed the injunction entered on July 16, 1986 and August 4, 1986, pending the outcome of the appeal to this court. App. 148-150.

A notice of appeal was filed in the district court by defendant Bowen on August 6, 1986. App. 151-152. A notice of appeal was filed in the district court by defendant Reivitz on August 13,

1986. App. 155-156. This appeal is being docketed in this court within sixty days from the filing of the notice of appeal as required by Supreme Court Rule 12.1.

The jurisdiction of this court is invoked under 28 U.S.C. §§ 1252 and 2101, because the district court specifically found that application of section 2640(a) of the DEFRA violates the fifth and fourteenth amendment rights to due process, just compensation and equal protection of the appellees, plaintiffs below. App. 123-124.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment, United States Constitution, provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, United States Constitution, provides:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL STATUTES INVOLVED

Effective October 1, 1984, 42 U.S.C. § 602(a), as amended by section 2640(a) of the Deficit Reduction Act of 1984, Pub. L. No. 98-369, sec. 2640, 98 Stat. 1145 (1984), provides in part:

> (a) Contents
>
> A State plan for aid and services to needy families with children must--
>
> . . . .
>
> (7) except as may be otherwise provided in paragraph (8) or (31) and section 615 of this title, provide that the State agency--
>
> (A) shall, in determining need, take into consideration any other

income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid;

. . . .

(8) . . . .

. . . .

(vi) shall disregard the first $50 of any child support payments received in such month with respect to the dependent child or children in any family applying for or receiving aid to families with dependent children (including support payments collected and paid to the family under section 657(b) of this title); . . . .

. . . .

(38) provide that in making the determination under paragraph (7) with respect to a dependent child and applying paragraph (8), the State agency

shall (except as otherwise provided in this part) include--

(A) any parent of such child, and

(B) any brother or sister of such child, if such brother or sister meets the conditions described in clauses (1) and (2) of section 606(a) of this title, if such parent, brother, or sister is living in the same home as the dependent child, and any income of or available for such parent, brother, or sister shall be included in making such determination and applying such paragraph with respect to the family (notwithstanding section 405(j) of this title, in the case of benefits provided under subchapter II of this chapter); . . . .

FEDERAL REGULATION INVOLVED

45 C.F.R. § 206.10(a)(1)(vii) (1985) provides:

For AFDC only, in order for the family to be eligible, an application with respect to a dependent child must also

include, if living in the same household and otherwise eligible for assistance:

(A) Any natural or adoptive parent, or stepparent (in the case of States with laws of general applicability); and

(B) Any blood-related or adoptive brother or sister.

STATEMENT OF THE CASE

This class action is brought by and on behalf of mothers and two classes of children, those who seek to have AFDC benefits restored ("AFDC children") and those children who have money of their own or who are receiving support payments from their fathers either directly or through social security survivor benefits and who live with the AFDC children ("other children"). The mothers and all of the children requested class certification and a preliminary injunction

preventing appellants from requiring the mothers to include within their AFDC filing units the "other children" and from withholding AFDC benefits pursuant to changes effected by section 2640(a) of DEFRA.

The federal law under consideration provides that in determining the need of applicants for AFDC the state agency administering the AFDC program must "take into consideration any other income and resources of any child or [cohabitant] relative" of those seeking aid under the AFDC program. 42 U.S.C. § 602(a)(7)(A). All income that is "actually available" to meet the needs of the AFDC applicant child, including any income which such AFDC child "has the legal ability" to make available for his or her support or maintenance, must be counted in determining his eligi-

bility for and the amount of AFDC benefits he will receive. 45 C.F.R. § 233.20(a)(3)(ii)(D). Wisconsin has established, pursuant to the requirements of 42 U.S.C. §§ 651 et seq., the Office of Child Support, which obtains and enforces child support orders issued by the Wisconsin courts.

Prior to October 1, 1984, AFDC applicants had the option of excluding from the filing unit any family member in the household if the excluded member had no legal duty to support the applicants. Any income or resources that the other children had would not be counted in determining the amount of AFDC benefits granted to applicants.

Effective October 1, 1984, 42 U.S.C. § 602(a)(38) was amended by sec. 2640(a) of DEFRA. In a response thereto, and to 45 C.F.R. § 206.10(a)(1)(vii), appellant

Reivitz issued an AFDC Handbook Release which directed all county social service departments in Wisconsin to include within the AFDC group any minor brothers and sisters who are dependent and who live with an AFDC child who is applying for or receiving AFDC unless they fall within one of the enumerated mandatory exclusions. Children who receive either child support or Title II benefits do not fall within the listed exclusions.

Title II of the Social Security Act of 1935, as amended, provides for Old-Age, Survivors, and Disability Insurance (OASDI) benefits to insured workers and their dependents. If a worker is insured within the meaning of the Social Security Act, and then dies, becomes disabled or retires, his dependent children are entitled to receive monthly insurance

benefits based on the amount of the insured worker's contribution to the system. 42 U.S.C. § 401 et seq.

During the last five months of 1985, since the state defendants implemented 42 U.S.C. § 602(a)(38), over 3500 families with one or more child receiving child support or Title II payments have begun to receive AFDC benefits in Wisconsin. App. 117. These families have had or will have their AFDC benefits reduced because of the inclusion of the "other children's" income in the AFDC filing unit.

Finding that plaintiffs below are likely to prevail on the merits, App. 123, the district court concluded that the federal law itself unconstitutionally deprives the "other children" of their property without due process, denies them equal protection and a just compensation,

and unconstitutionally conditions these families' receipt of AFDC benefits on a classification which bears no rational relationship to a legitimate legislative objective. The court further concluded that the "other children" who have their own money, receive child support or Title II benefits, have constitutionally protected interest in property which is being taken without due process. App. 123. The court also considered (1) the interest, or expectation, of fathers making payments pursuant to a court decree requiring them to support their children that the money they pay will be used to satisfy their legal support obligation and (2) the interest, or expectation, of fathers now disabled or deceased that contributions they made to the social security old-age, survivor, and disability insurance program would

entitle their children to Title II benefits in the case of their fathers' death or disability. App. 125-126.

In its Findings of Fact, Conclusions of Law and Order, the district court preliminarily enjoined appellants from applying these new federal and state provisions to plaintiffs. App. 101-141. In its order of August 14, 1986, the district court stayed the injunction pending the outcome of defendants' appeal to this court. App. 148-150.

ARGUMENT

THE QUESTION PRESENTED IS SUBSTANTIAL.

A. Numerous federal courts have reached varying results for different reasons in addressing the validity of these AFDC provisions.

In at least eleven cases involving the same issue, federal courts are evenly

divided. No purpose would be served in repeating verbatim at this time the positions taken by those courts.

At least five district courts have found in the government's favor on identical or substantially similar issues and have denied injunctive relief. Sherrod v. Heqstrom, 629 F. Supp. 150 (D. Or. 1985); Oliver v. Ledbetter, Civ. No. C85-3691 (D. Ga., Dec. 16, 1985); Creaton v. Heckler, Case No. 85-3306-R (C.D. Cal. Unpublished Order dated June 20, 1985); Huber v. Blinzinger, Case No. S 82-542 (N.D. Ind. Unpublished Memorandum and Order dated April 8, 1985); Shonkwiler v. Heckler, Case No. IP 84-1612-C (S.D. Ind. Unpublished Order dated February 20, 1985).

At least six district courts have preliminarily enjoined implementation of the statute and regulation. Frazier v.

Pingree, 612 F. Supp. 345 (M.D. Fla. 1985); White Horse v. Heckler, Case No. CIV. 85-3006 (D. S.D. Unpublished Memorandum Opinion dated March 29, 1985); Gorrie v. Heckler, 606 F. Supp. 368 (D. Minn. 1985); Gibson v. Sallee, Case No. 3-85-1283 (M. D. Tenn. Unpublished Memorandum Opinion dated February 28, 1986); Short v. Heckler, Civil Action No. C85-2248 (W. D. Wash. Order entered January 6, 1986); Gilliard v. Kirk (W.D.N.C. Memorandum Decision and Order entered May 7, 1986).

In some of the cases favorable to appellees' position, the court concluded that Congress could not have intended, implicitly or explicitly, to alter the provisions of 42 U.S.C. §§ 405(j) and 408(e) by enacting 42 U.S.C. § 602(a)(38). For example see Frazier v. Pingree, 612 F. Supp. 345. Although the

individual court may not have approved of what Congress did, there really can be no doubt concerning the intent of Congress.

Only in Gilliard v. Kirk did a district court find constitutional infirmities similar to those found in this case.

B. Congress has legitimate concern with the practice of families who increase the amount of AFDC benefits they receive by excluding from the filing unit parents and siblings with income.

All of the amendments made by DEFRA were intended to reduce governmental expenditures and the federal deficit. H.R. Rep. No. 432, Part II, 98th Cong., Ind Sess. 1094, reprinted in 1984 U.S. Code Cong. & Ad. News 697, 770.

In light of the federal deficit, Congress was particularly concerned with the practice of families who increase the amount of AFDC benefits that they receive by excluding from the the filing unit parents and siblings with income. H.R. Conf. Rep. No. 861, 98th Cong., 2nd Sess. 1407, reprinted in 1984 U.S. Code Cong. & Ad. News 1445, 2095.

Congress intended the attribution of child support income to other family members as a means of reducing AFDC expenditures as evidenced by the regulatory distinction between "actually" available and "legally" available income. The statutory language is clarified by 45 C.F.R. § 233.20(a)(3)(ii)(D) which provides:

> Income after application of disregards, except as provided in paragraph (a)(3)(xiii) of this section, and resources available for current use shall be considered. To the extent

> not inconsistent with any other provision of this chapter, income and resources are considered available both when actually available and when the applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance.

In the comments to the regulations regarding AFDC benefits, the Secretary of Health and Human Services stated:

> All of the income and resources of the individuals required to be included in the assistance unit must be considered in determining eligibility and payment for the assistance unit. In this connection, the statute specifically provides for the inclusion of title II benefits, notwithstanding [42 U.S.C. § 405(j)]. When title II benefits are paid to a representative payee on behalf of a member of the assistance unit and the payee lives in the same household as the assistance unit, the title II benefits must be counted as income. When the representative payee does not live in the household, the title II benefits are included only to the extent that the payee makes them available for the support of the beneficiary. Conforming

> changes in title II regulations will be published shortly.

49 Fed. Reg. 35588-89 (September 10, 1984).

Thus, under the Act itself and the regulations and interpretations thereof, it is now clear that OASDI benefits received by a representative payee on behalf of a child must be treated as income to the family unit for the purposes of calculating AFDC benefits.

The family filing unit concept imposed by the DEFRA amendment is a recognition by Congress that siblings related by blood and/or adoption who live together with a shared custodial parent will most likely utilize economies of scale and combined resources to meet their subsistence needs. This same concept has been accepted by courts as a legitimate government concern. For example, in Brown v. Heckler, 589 F.

Supp. 985 (E.D. Pa. 1984), the court upheld an AFDC provision deeming the income of a stepparent available to the family unit.

The deeming of income has been judicially approved recently under a variety of circumstances. Schweiker v. Gray Panthers, 453 U.S. 34 (1981) (deeming a spouse's income as available to a medicaid applicant); Kollett v. Harris, 619 F.2d 134 (1st Cir. 1980) (deeming as actually available to a disabled child the income of his parents or stepparents under the SSI program).

Congress has presumed that all family members residing in one household should and do share certain household expenses. Thus, need is measured by assessing the aggregated resources of all family members. In Sherrod v. Hegstrom, 629 F. Supp. at 152, the court found a

rational basis in this family filing unit concept under circumstances all but identical to the present case.

The challenged legislation is rationally related to the cognizable goals of dealing with budgetary constraints and responsibly allocating limited social welfare funds. Dandridge v. Williams, 397 U.S. 471 (1970). There are limited resources to spend on welfare benefits, and Congress legitimately may take a course of action which prevents dissipation of resources that could be spent on the needy. See Schweiker v. Gray Panthers, 453 U.S. at 48. The appellees here are not denied any due process or equal protection rights by Congress' reallocation of AFDC benefits. See U.S. R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980).

C. The purpose in treating child support payments as income is clear and permissible.

The general duty to support one's dependents predated the inception of the AFDC program. Therefore, there was and is nothing unusual or unlawful about considering the basic duty to support and the fruits thereof in reaching a determination concerning the amount of entitlement under a federal program such as AFDC.

Appellees contend that the beneficiaries of child support orders have an interest in the continued receipt of support payments. This alleged right for years has been modified to the extent that a child receiving AFDC benefits must assign said benefits to the state under sec. 49.19(4)(h)1.b., Wis. Stats. This demonstrates that AFDC payments are

designed to supplant or substitute for child support payments rather than to be added to such support payments.

The changes effected by the recent DEFRA amendment will have essentially the same effect. Nothing in Wisconsin law prohibits such a result.

The district court's emphasis on the expectations of fathers making child support payments or receiving OASDI benefits is improper. One is the champion of only his own rights and cannot assert the constitutional rights of others. Tileston v. Ullman, 318 U.S. 44, 46 (1943).

D. Deeming of income for OASDI benefits is permissible.

As early as 1981, Congress enacted changes in the AFDC program that were intended to reduce or eliminate benefits

because of the availability of other sources of income for those considered by Congress to be less needy than those completely without resources. Philadelphia Citizens in Action v. Schweiker, 669 F.2d 877, 879 (3rd Cir. 1982). The challenged amendment to the AFDC provisions is merely an extension of those original changes.

Admittedly for a child who is under 18 benefits under Title II generally are paid to a "representative payee" who has the responsibility to use the benefits solely for the use and benefit of the beneficiary. 42 U.S.C. § 405(j). It is a criminal act for the payee to use the funds for any purpose other than the use and benefit of the beneficiary. 42 U.S.C. § 408(e).

Contrary to appellees' assertion, the challenged amendment does not act as

a repeal of either of these sections. The AFDC amendment merely excludes a certain number of cases from the coverage of the OASDI provisions which otherwise remain intact.

E. The district court abused its discretion in granting a preliminary injunction.

Appellees failed to show a reasonable likelihood of success on the merits given the government's legitimate interest in achieving the desired results under the DEFRA amendment. Further, this is a somewhat unusual case in which the effect of the new law in most instances was to reduce the level of benefits for a particular household rather than denying benefits altogether. Even a cursory reading of plaintiffs' complaint and the affidavits attached thereto which also are summarized in the court's decision,

App. 112-117, indicates that these household units are financially better off than other units within the AFDC population even under the new law. Therefore, the injury threatened to plaintiffs in not granting the injunction would not be nearly as harsh as it would be in many typical welfare cases wherein the only issue is eligibility or ineligibility for benefits altogether. No single family will experience a devastating impact from the court's granting of the stay even though obviously any reduction can cause a hardship in a household unit which is accustomed to a higher level of benefits.

CONCLUSION

For the foregoing reasons, this court should note probable jurisdiction and summarily reverse the lower court's

decision. In the alternative, the court should give plenary consideration to this appeal, with briefs on the merits and oral argument.

Dated at Madison, Wisconsin, this 11th day of September, 1986.

BRONSON C. LA FOLLETTE
Attorney General of Wisconsin
Counsel for Appellant
Linda Reivitz

Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3406

DONALD P. JOHNS
Assistant Attorney General
of Wisconsin
Counsel of Record